

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL W. MACHUTA,

Plaintiff/Counter Defendant-
Appellee,

v

CONSTANCE J. MACHUTA,

Defendant/Counter Plaintiff-
Appellant.

UNPUBLISHED

May 20, 2008

No. 274860

Isabella Circuit Court

LC No. 05-003721-DM

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

O’CONNELL, J. (*concurring*).

I concur with the majority opinion. I write separately to say that, from the present record, I am unable to discern if the trial court committed clear error. I agree with the trial court when it stated, “there’s something that the Court smells here,” but I do not possess a definite and firm conviction that a mistake has been made because I cannot “determine where the smell is coming from.” I would affirm the decision of the trial court.

Plaintiff has created a lot of smoke, and the evidence contained in the lower court record created a few sparks. However, it has yet to reach the level of a fire and, without a fire, I cannot conclude that the trial court abused its discretion in refusing to set aside the judgment. I am heartened by the fact that the judgment of divorce provides the trial court with jurisdiction over any assets that were undisclosed. Should additional discovery reveal other similar interests that plaintiff failed to disclose, defendant is not without a remedy.

Although the trial court did not find that plaintiff’s misrepresentations rose to the level of fraud, based on the record, defendant was entitled to discovery sanctions pursuant to MCR 2.313(B) for plaintiff’s failure to comply with his duty to supplement incorrect discovery responses under MCR 2.302(E). In some cases, where the failure to supplement is particularly egregious, a default judgment may be entered. *Traxler v Ford Motor Co*, 227 Mich App 276, 280-287; 576 NW2d 398 (1998). Partial answers that omit relevant information can rise to that level. *Id.* at 285-286. The evidence indicates that plaintiff knowingly gave misleading responses in his interrogatory responses and at his deposition. The responses were intentionally deceptive and defendant likely should have been granted some relief. However, defendant’s motion only sought to have the mediation agreement set aside. I cannot say that the trial court clearly erred in not granting discovery sanctions when defendant never requested such relief.

I would affirm the decision of the trial court.

/s/ Peter D. O'Connell